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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 22, 1997

BY HAND

Mr. William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: **Notice of Ex Parte Presentation**
Direct Broadcast Satellite Public Service Obligations
MM Docket No. 93-25

Dear Mr. Caton:

This is to provide notice that Richard H. Waysdorf, Corporate Counsel of Encore Media Group LLC ("Encore") and Robert L. Hoegle, counsel for Encore, met on August 21 with the following persons regarding the above-referenced rulemaking: Ari Fitzgerald, Senior Legal Advisor; Rosalee Chiara, Deputy Chief, Satellite Policy Branch; and Brian Carter, Staff Attorney. An original and one copy of this letter and enclosure are being submitted to you for inclusion in the record in this proceeding, and copies are being provided to each attendee.

During that meeting, we discussed the application of the proposed rules in this proceeding to WAM! America's Kidz Network -- Encore 7. We generally reviewed the subjects set forth in the enclosed letter to Mr. Fitzgerald, copies of which have been provided to the recipients of this letter. We also discussed the proposals in the comments and reply comments submitted by Children's Television Workshop.

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If you have any questions regarding the above information or enclosure, please contact the undersigned.

Very truly yours,

Robert Hoegle

Robert L. Hoegle

RLH:jsl
Enclosure

cc: Chairman Reed E. Hundt (w/encl.)
Commissioner Rachelle B. Chong (w/encl.)
Commissioner Susan Ness (w/encl.)
Commissioner James Quello (w/encl.)
Jane Mago, Senior Legal Advisor for Commissioner Chong (w/encl.)
Thomas A. Boasberg, Senior Legal Advisor for Chairman Hundt (w/encl.)
Peter Cowhey, Chief, International Bureau (w/encl.)
Ari Fitzgerald, Senior Legal Advisor, International Bureau (w/encl.)
Rosalee Chiara, Deputy Chief, Satellite Policy Branch (w/encl.)
Brian Carter, Staff Attorney

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August 21, 1997

Ari Fitzgerald, Esquire
Senior Legal Advisor
International Bureau
Federal Communications Commission
2000 M Street, N.W.
Washington, D.C. 20554

EX PARTE COMMUNICATION

Re: Direct Broadcast Satellite Public Service Obligations,
MM Docket No. 93-25

Dear Mr. Fitzgerald:

This is to follow up on our discussion last week regarding the appropriate construction of the statutory framework for the Commission's rules in this proceeding. Encore Media Group LLC ("Encore") provides this further information and analysis regarding the implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") which added Section 335 to the Communications Act. More specifically, Encore addresses explains the statutory construction which makes clear that the non-commercial educational programming provided by Encore's WAM!/America's Kidz Network ("WAM!") meets the public interest requirements of Section 335(b).

Section 335(b)(1) mandates that the Commission require each DBS operator to reserve "a portion of its channel capacity . . . exclusively for noncommercial programming of an educational or informational nature." Encore respectfully submits that the further requirement in Section 335(b)(3) that DBS operators "shall meet" the requirements of the section "by making channel capacity available to national educational programming suppliers" is mandatory but non-exclusive such that the Commission may adopt rules authorizing DBS operators to satisfy at least a portion of the reserved channel capacity with non-commercial programming from other providers. In any event, the definition of "national educational programming suppliers" is sufficiently broad to include WAM!.

I. Section 335(b)(3) Does Not Require DBS Operators To Make Channel Capacity Available Exclusively to National Educational Programming Suppliers.

The core purpose of Section 335(b)(1) is to require DBS operators to reserve channel capacity for "non-commercial programming of an educational or informational nature." In upholding the constitutionality of Section 335, the Court of Appeals recognized this essential purpose:

> Section 25 . . . represents nothing more than a new application of a well-settled policy of ensuring public access to noncommercial programming. The section achieves this purpose by requiring DBS providers to reserve a small portion of their channel capacity for such programs as a condition of their being allowed to use a scarce public commodity.

Time Warner Entertainment Co., L.P. v. Federal Communications Commission, 93 F.3d 957, 976 (D.C. Cir. 1996). Consistent with its basic purpose, the Court upheld Section 335 as a reasonable means of providing access to diverse programming -- not as a means to guarantee an outlet for a particular class of speakers.

Notwithstanding the core purpose of the statute to provide access to non-commercial programming, certain publicly-funded broadcasters have asserted that Section 335(b)(3)[1] creates a narrow, exclusive class of programming suppliers whose programming alone can meet the public interest requirements of Section 335(b)(1). Encore believes that such an interpretation would undermine rather than foster access to non-commercial programming. Publicly-funded broadcasters are but a subset of the eligible programming suppliers, and the language of Section 335(b)(3) requires no such constraint.

Encore does not dispute that use of the word "shall" in a statute traditionally is mandatory. Indeed, Encore does not dispute the mandate in Section 335(b)(3). However, the statute does not state that this is the exclusive means to meet the reservation requirements or that all Section 335(b)(1) reserved channels must be utilized in this manner. Such an interpretation would undermine access to "non-commercial programming" by limiting the potential providers,

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[1] Section 335(b)(3) provides that:

> A provider of direct broadcast satellite service shall meet the requirements of this subsection by making channel capacity available to national educational programming suppliers, upon reasonable prices, terms, and conditions, as determined by the Commission under paragraph (4) . . . .

thereby increasing the likelihood that this channel capacity could be used for commercial purposes under Section 335(b)(2).

Such a narrow view of the Section 335(b)(1) mandate -- limiting it to the exclusive domain of nonprofit programmers -- is also problematic because it would require, by extension, that all such reserved channels be filled with programming for which nonprofit programmers pay carriage fees under the "reasonable prices, terms, and conditions" established pursuant Section 335(b)(3) and (4). Even the public broadcasting entities cringe at the thought that they must pay for carriage of all programming satisfying the Section 335(b)(1) requirements, even at "discount" prices. As a practical matter, this channel capacity would likely be used instead for commercial purposes under Section 335(b)(2) because there will be too few takers at even a discounted price.

Moreover, such a narrow approach would be arbitrary in relying on for-profit or nonprofit status as a bright line test for eligible programming under Section 335(b)(1) when the clear intent was to create an obligation to present noncommercial educational programming. Indeed, such a bright line is not so bright at all because many of the programs carried on public broadcast stations are produced by for-profit entities (such as the News Hour with Jim Lehrer, which is produced by a for-profit affiliate of Encore's parent, Liberty Media Corporation), while much of the programming on WAM! is produced by nonprofit or governmental entities (e.g., Agency for Instructional Television and TV Ontario).[2] Although nonprofit status may be relevant in determining eligibility for access to some portion of the reserved channel capacity under the price limitations of Sections 335(b)(3) and (4), nonprofit or for-profit status would be an arbitrary standard for determining eligible noncommercial educational programming to meet the core requirements of Section 335(b)(1).

The imprecise blending of these two concepts in Section 335 -- that of noncommercial educational programming with nonprofit status -- is perhaps a function of the era in which the statute was written. At the time the 1992 Cable Act was drafted, the only program providers presenting substantial amounts of noncommercial educational programming were the types of entities included by name in Sections 335(b)(3) and (5). WAM! -- the only full-time noncommercial children's educational network -- was not launched until 1994. Nonetheless, its mission is fully consistent with what Congress intended in drafting Section 335(b)(1), i.e. to present children's educational programming without the "taint" of commercialization.

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[2] Indeed, certain nonprofit program suppliers, such as Children's Television Workshop (which is not presently providing a full channel of educational programming but reportedly has been negotiating with for-profit entities to form a joint venture to do so), have suggested that any joint venture between nonprofit and for-profit entities be deemed to be in compliance with Section 335(b)(3). Conceptually, there is no meaningful difference between such a proposal and a service like WAM!, for which a substantial amount of the programming is produced by nonprofit or government entities, but the network itself is owned by a for-profit company.

Notwithstanding the directive in Section 335(b)(3) that DBS operators "shall meet" the reservation requirements by making channel capacity available to "national educational programming suppliers," the statute does not foreclose the Commission from exercising its discretion to make such channels available for non-commercial educational programming provided by others. In *Ute Indian Tribe v. Hodel*, 673 F. Supp. 619, 621-22 (D.D.C. 1987), the court held that a statute's use of the word "shall" is not always mandatory and does not preclude other alternatives. In *Ute*, the court ruled that the Secretary of the Interior had discretionary authority to decline to disburse trust funds notwithstanding the statute's command that the Secretary disburse such funds upon request. *Id.* at 621. In its ruling, the court determined that the Secretary could consider the overall framework of the statute and its fiduciary duty to administer the trust fund and exercise discretion in declining to disburse funds from the trust. *Id.* at 622.

Encore believes that the Commission mandate in Section 335(b)(1) cannot be harmonized with Section 335(b)(3) unless it adopts rules that permit all providers of non-commercial educational programming to meet the public interest programming requirements of Section 335(b)(1). If Congress had intended to limit the eligible pool of qualified programming under Section 335(b)(1), it would have used a narrower term or specified the sources in Section 335(b)(1).

II. WAM! Qualifies as a "National Educational Programming Supplier" Under Section 335(b)(5)(B).

Even if Section 335(b)(3) were the exclusive means to satisfy the channel reservation requirements of Section 335, the term "national educational programming supplier" is defined to "include[ ] any qualified noncommercial educational television station, other public telecommunications entities, and public or private educational institutions." 47 U.S.C. § 335(b)(5)(B). As a matter of statutory construction, use of the word "include" is "not a finite word of limitation," but rather permits the conclusion that other items or entities not specifically enumerated may fall within the defined term. *Federal Election Commission v. Massachusetts Citizens for Life*, 769 F.2d 13, 17 (1st Cir. 1985), aff'd, 479 U.S. 238 (1986); 2A N. Singer, *Sutherland Statutes and Statutory Construction* 152 (5th ed. 1992). Indeed, one court held that the term "corporation" included in a definition of entities eligible to file petitions under the U.S. Bankruptcy Code could be construed and extended to include a labor union. *Highway & City Freight Drivers, Dockmen and Helpers v. Gordon Transports, Inc.*, 576 F.2d 1285, 1289 (8th Cir.), *cert. denied*, 439 U.S. 1002 (1978). The court further noted that the Bankruptcy Code definition used

> the word "includes" when setting out the types of organizations that come within the definition rather than the word "means." When a statute is phrased in this manner, the fact that the statute does not specifically mention a particular entity

> (in this case labor unions) *does not imply that the entity falls outside of the definition.*

Id. (citations omitted) (emphasis added).

It is a well-established principle of statutory construction that use of the term "includes" is not a term of limitation and should not limit the class of entities eligible under Section 335(b)(5)(B) as urged by certain publicly-funded broadcasters. If the words comprising the phrase "national educational programming supplier" in the statutory definition are given their common and ordinary meanings, WAM! clearly qualifies.[3] WAM! is the only full-time, completely commercial-free network dedicated to educating and instructing by engaging the interests and needs of an underserved 8 to 16 year old audience. As noted above, entities such as WAM! did not exist at the time Congress passed the 1992 Cable Act, but entities meeting the plain and ordinary meaning of the term "national educational programming supplier" should clearly be qualified as such by the Commission. Accordingly, the Commission should base its decision to include for-profit educational programming providers in the definition found in Section 335(b)(5)(B) based on the plain and common meaning of the term itself.

Finally, adoption of a narrow definition of "national educational programming supplier" that excludes otherwise-qualified educational programming may cause DBS operators to revisit the First Amendment issues raised in *Time Warner*. Precluding for-profit providers of otherwise qualified programming from participating in the reserved channels raises an issue as to whether the *operation and implementation* of Section 335 impermissibly infringe upon the First Amendment rights of DBS operators. Precluding for-profit suppliers of high quality non-commercial educational programming such as WAM! from qualifying under Section 335 will decrease the amount of qualified educational programming available, a result not intended by Congress.

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[3] Although the legislative history for Section 335 is sparse, Congress clearly contemplated that "public telecommunications entities," which are listed as a "national educational programming supplier," could obtain programming "furnished. . . by independent production services." S. Rep. No. 102-92, 102d Cong. 1st Sess. 92 (1991). Further, a *for-profit*, private educational institution also would qualify as a national educational programming supplier under Section 335(b)(5)(B) in addition to publicly-funded educational institutions. Again, there is nothing in the plain meaning of Section 335(b)(5)(B) to preclude for-profit institutions from qualifying, and such interpretation is consistent with the meager legislative history of Section 335 and the listed suppliers in Section 335(b)(5)(B).

In short, Encore respectfully submits that the statute authorizes the Commission to adopt rules in this proceeding that would allow: (1) WAM! and other private entities to provide "noncommercial programming of an educational or informational nature" on at least a portion of the channel capacity reserved under Section 335(b)(1); and (2) WAM! and other private entities to qualify as "national educational programming suppliers" under Section 335(b)(5)(B). By doing so, the Commission's rules will serve the core purpose of Section 335 -- to ensure that quality non-commercial programming will remain available to the American public.

Very truly yours,

Robert Hoegle

Robert L. Hoegle
Counsel for Encore Media Group LLC

RLH:msd
cc: Chairman Reed Hundt
Commissioner Susan Ness
Commissioner James Quello
Commissioner Rachelle B. Chong
Secretary, for Submission in MM Docket No. 93-25